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Supreme Court, U.S.
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In The

Supreme Court of the United States

GERALD KAISER,

Petitioner,

v.

STATE OF ARIZONA, CITY OF SCOTTSDALE,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals, State Of Arizona, Division One

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a city ordinance making it a crime to "refuse to obey a peace officer" is unconstitutionally vague and overbroad.

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The opinion of the Court of Appeals, State of Arizona, Division One, is published at 204 Ariz. 514, 65 P.3d 463 (2003). A copy of the opinion is included as Appendix A. The Arizona Supreme Court denied review on September 9, 2003. The denial of review is included as Appendix B.

STATEMENT OF JURISDICTION

The Arizona Supreme Court denied review of the final judgment of the Court of Appeals, State of Arizona, Division One, on September 9, 2003. This Court has jurisdiction under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for redress of grievances." U.S. Const., amend. I.

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend XIV.

STATUTORY PROVISION INVOLVED

Scottsdale City Code §19-13: "No person shall refuse to obey a peace officer engaged in the discharge of his duty, or any other person authorized to aid in quelling any riot, rout, or affray."

STATEMENT OF THE CASE

Dr. Gerald Kaiser was convicted of violating a city's ordinance that makes it a crime for a person to "refuse to obey" orders from a peace officer. Scottsdale City Code §19-13. He was convicted of this despite being simultaneously acquitted of charges of Resisting Arrest, A.R.S. §13-2508, and of Threatening and Intimidating, A.R.S. §13-1202.

The events which led to Dr. Kaiser's conviction occurred on April 29, 2000, when two Scottsdale police officers stopped a car after an officer suspected that the driver, Kaiser's wife, was intoxicated. *Tr. at 26, 51.* Dr. Kaiser was a passenger. When his wife got out of the car to talk with one officer, Dr. Kaiser yelled at his wife to not answer any questions or perform any field-sobriety tests. *Tr. at 30, 31, 53, 54, 120-121.*

The other officer ordered Dr. Kaiser to remain in the vehicle. *Tr. at 28, 30, 53, 119.* Dr. Kaiser refused and continued speaking to his wife about how she should handle the situation. *Tr. at 31, 54, 97, 141-142.* The officer told Kaiser that he was hindering a police investigation and that he could be arrested for this. *Tr. at 91, 122.* The officers repeatedly told Kaiser to get in the car and, at one point, attempted to physically place him in the vehicle. *Tr. at 47, 92, 123-124.* Kaiser refused and exited the vehicle

for the purpose of speaking with his wife. *Tr. at 32, 34, 47, 58, 92, 129.* A heated verbal exchange between Kaiser and the officers ensued. *Tr. 129, at 177.* At one point, an officer struck Dr. Kaiser in his chest. *Tr. 176-177.* After this occurred, Dr. Kaiser made derogatory comments about the officer, including using profanities. *Tr. 142-145.* At no time, did Kaiser physically touch the officers or do anything other than refuse their order to remain in the car.

The officers arrested Dr. Kaiser and he was charged with Resisting Arrest, A.R.S. §13-2508; Threatening and Intimidating, A.R.S. §13-1202; and Refusing to Obey a Peace Officer, Scottsdale City Code §19-13.

Dr. Kaiser was acquitted of the first two charges in a bench trial in Scottsdale City Court, but was convicted of Refusing to Obey a Peace Officer. He was sentenced on April 13, 2001 and, pursuant to Arizona law, he appealed his conviction to the Maricopa County Superior Court. The Superior Court denied his appeal and Dr. Kaiser then appealed to the Arizona Court of Appeals, Division One, which affirmed his conviction and rejected his argument that Scottsdale City Code §19-13 is unconstitutionally vague or overbroad. Dr. Kaiser then sought review in the Arizona Supreme Court, which denied review on September 9, 2003.

REASONS FOR GRANTING THE WRIT

Throughout the country, individuals are being convicted solely for disobeying orders from a police officer. *See, e.g., Polk v. State,* 2003 WL 22674284, ___ A.2d ___ (Md. App. 2003); *State v. Hookstra*, 10 Neb.App. 199 (2001). Laws making it a crime to refuse to comply with

orders from a peace officer exist in cities and states across the country. *See, e.g.,* Ala. Code, §32-5A-4; Fla.Stat., §843.02; Iowa Code, §372.14; Mass. G.L. c. 90, §25. Such statutes and ordinances are inconsistent with this Court's invalidation of similar laws, such as those that make it a crime to interrupt a police officer in the performance of duties, *City of Houston v. Hill,* 482 U.S. 451 (1987), or to fail to disperse when ordered to do so by a police officer. *City of Chicago v. Morales*, 527 U.S. 41 (1999). A law which makes it a crime to "refuse to obey" a peace officer is inherently vague and overbroad because it criminalizes lawful, constitutionally protected behavior. An individual, for example, could be convicted under this law for disobeying a police order to be silent when there is a right to speak or to disperse from a place where the person is constitutionally entitled to be present.

Thus, this Court should grant review to resolve the important issue, affecting state and local governments across the country and countless individuals, as to whether a law which makes it a crime to "refuse to obey" a peace officer is unduly vague and overbroad. In *Shuttlesworth v. City of Birmingham,* 382 U.S. 87, 91 (1965), this Court indicated that a statute which made it unlawful for any person to "refuse or fail to comply with any lawful order, signal or direction from a police officer" raised "constitutional doubts of the utmost gravity." Dr. Kaiser's conviction requires that this Court address the issue that was not resolved in *Shuttlesworth* and decide whether laws that exist throughout the country which make it a crime to disobey any order from a police officer, at any time, are impermissibly vague and overbroad.

THE SUPREME COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND TO DECIDE A QUESTION OF NATIONAL IMPORTANCE AS TO WHETHER LAWS PROHIBITING DISOBEYING A POLICE OFFICER ARE UNCONSTITUTIONALLY VAGUE AND OVERBROAD

In many cases, this Court has declared unconstitutional state and local laws which accord police officers unfettered discretion to arrest individuals for constitutionally protected behavior. This Court has stressed that such laws are impermissibly vague and overbroad in violation of the First and Fourteenth Amendments.

This Court's decision in *City of Houston v. Hill* is exactly on point. The issue was whether "a municipal ordinance that makes it unlawful to interrupt a police officer in the performance of his or her duties is unconstitutionally overbroad under the First Amendment." 482 U.S. at 452. Indeed, the facts of *Hill* are remarkably similar to this case. Hill observed a friend intentionally stopping traffic on a busy street, evidently to enable a vehicle to enter traffic. Two Houston police officers approached Hill's friend and began speaking with him. Shortly thereafter, Hill began shouting at the officers in an admitted attempt to divert the officers' attention. *Id.* Hill shouted: "Why don't you pick on somebody your own size?" After Officer Kelley responded: "[A]re you interrupting me in my official capacity as a Houston police officer?" Hill then shouted: "Yes, why don't you pick on somebody my size?" *Id.* Hill was arrested under Houston Code of Ordinances §34-11(a), for "wilfully or intentionally interrupt[ing] a city policeman . . . by verbal challenge during an investigation."

This Court found the Houston ordinance unconstitutionally overbroad because it allowed individuals to be punished solely for speech to police officers that is protected by the First Amendment. The Court stressed that the ordinance "is not narrowly tailored to prohibit only disorderly conduct or fighting words." *Id.* at 463. This Court thus concluded: "Houston's ordinance criminalizes a substantial amount of constitutionally protected speech, and accords the police unconstitutional discretion in enforcement. . . . Far from providing the 'breathing space' that 'First Amendment freedoms need . . . to survive,' the ordinance is susceptible of regular application to protected expression. We conclude that the ordinance is substantially overbroad, and that the Court of Appeals did not err in holding it facially invalid." *Id.* at 465 (citations omitted).

Similarly, in *Lewis v. City of New Orleans*, 415 U.S. 130, 131 (1974), this Court invalidated as unconstitutionally vague and overbroad a city ordinance which made it "unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty." *Lewis*, too, had facts very similar to this case. Lewis yelled obscenities and threats at an officer who had asked her husband to produce his driver's license. This Court overturned the conviction stressing the broad discretion accorded police under the law. As Justice Powell explained in a concurring opinion, "[t]his ordinance, as construed by the Louisiana Supreme Court, confers on police a virtually unrestrained power to arrest and charge persons with a violation. Many arrests are made in 'one-on-one' situations where the only witnesses are the arresting officer and the person charged." *Id.* at 134 (Powell, J., concurring).

There is an obvious conflict between the Arizona Court of Appeal's decision in this case and this Court's rulings in cases such as *City of Houston v. Hill* and *Lewis v. City of New Orleans.* In *Hill* and *Lewis*, the Court declared unconstitutional as impermissibly vague and overbroad laws that made it a crime to interfere with a police officer or to use profanities in speaking to a police officer. Yet, that is exactly what the ordinance in this case does: Dr. Kaiser was arrested solely for interfering with police officers and for using profanities in talking with them.

In fact, the ordinance here is even broader than those invalidated in *Hill* and *Lewis*. Unlike the Houston ordinance considered in *Hill*, Scottsdale's law does not require that an individual interfere with a police officer. Rather, disobeying *any* order from a police officer, however unreasonable or unconstitutional and even if it in no way interferes with the officers' duties, is a crime. Disobeying an officer's order to refrain from constitutionally protected speech or assembly is made a crime by this law, showing its obvious overbreadth and its conflict with earlier decisions of this Court.

If ordinances such as Scottsdale's are constitutional, then this Court's rulings in cases like *Hill, Lewis,* and countless other cases are rendered meaningless. City ordinances, such as that invalidated in *Hill,* making it a crime to interfere with a police officer would be unnecessary; cities could just prohibit disobeying an officer and any interference could be punished under those laws. Ordinances, such as in *Lewis*, which make it a crime to use obscene or opprobrious language will be replaced by laws prohibiting disobeying a police officer; a police order to

stop swearing would be the basis for an arrest and a conviction.

Indeed, numerous laws which this Court has found impermissibly vague and overbroad are narrower than statutes and ordinances prohibiting "disobeying a police officer." For example, in *City of Chicago v. Morales,* 527 U.S. 41 (1999), the Court invalidated a Gang Congregation Ordinance, which prohibits "criminal street gang members" from "loitering" with one another or with other persons in any public place. The ordinance made it a crime for individuals to refuse to comply with a police order to disperse from an area if a police officer reasonably believed that at least one of two or more persons present in a public place was a member of a "criminal street gang" and that the persons were loitering by remaining in a place "with no apparent purpose."

The Chicago ordinance was quite narrow compared to the Scottsdale ordinance in this case: it applied only when police suspected a person of being a gang member; only when people were present with no apparent purpose; and it authorized arrest and conviction only for failing to obey a police order to disperse. In contrast, the Scottsdale ordinance at issue here allows arrest and conviction of anyone for failing to follow any police order at any time. Despite the relative narrowness of the Chicago ordinance, this Court found it impermissibly vague. As The Court explained: "The broad sweep of the ordinance also violates the requirement that a legislature establish minimal guidelines to govern law enforcement." *Id.* at 59. Justice Breyer elaborated: "I believe the ordinance violates the Constitution because it delegates too much discretion to a police officer to decide whom to order to move on, and in what circumstances. And I see no way to distinguish in the

ordinance's terms between one application of that discretion and another. The ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in every case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications." *Id.* at 70 (Breyer, J., concurring).

But if the Scottsdale ordinance is constitutional, then Chicago can simply replace its unconstitutional anti-gang ordinance with one making it a crime to disobey a police officer. Police officers could arrest loitering gang members for not complying with orders to disperse under this ever broader and more vague ordinance. Surely, if it unconstitutional for a city to make it a crime for loitering suspected gang members to comply with a police order to disperse, then it is impermissible for a city to make it a crime to disobey any police order.

Likewise, ordinances making it a crime to disobey a police officer conflict with this Court's decisions invalidating loitering laws. *See, e.g., Papachristou v. City of Jacksonville,* 405 U.S. 156 (1971) (invalidating a loitering law on vagueness grounds). For instance, in *Kolender v. Lawson*, 461 U.S. 352 (1983), this Court declared unconstitutional a criminal statute that requires persons who loiter or wander on the streets to provide a "credible and reliable" identification and to account for their presence. The Court concluded that the law "is unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute." *Id.* at 360. Yet, if ordinances like Scottsdale's are upheld, then a state can replace its unconstitutional loitering law with

use of a statute prohibiting disobeying a police officer. Officers could order anyone to disperse, or as in *Kolender* to provide identification, and the failure to do so would be a crime.

Thus, this Court should grant review to resolve the obvious conflict between the Arizona Court of Appeals decision upholding a law making it a crime to disobey a police officer and the many decisions of this Court invalidating similar, and even much narrower laws, on vagueness and overbreadth grounds. This case presents important issues concerning both the vagueness and the overbreadth doctrines.

The Scottsdale ordinance is unduly vague because it fails to provide any guidance as to when disobeying a police officer can be the basis for criminal punishment. In *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), this Court found unconstitutionally vague a city law that prohibited individuals from assembling on a sidewalk and conducting themselves in a manner annoying to persons passing by. The Court invalidated this law and explained: "It is said that the ordinance is broad enough to encompass many types of conduct clearly within the city's constitutional power to prohibit. And so, indeed, it is. The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct. It can do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited. It cannot constitutionally do so through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed." *Id.* at 614 (citations omitted). Yet, ordinances like Scottsdale's allow a police officer who is "annoyed" to

arrest a person for disobeying any police order, no matter how trivial.

Vague laws, such as Scottsdale's ordinance, give police unfettered discretion. As this Court explained: "The more important aspect of the vagueness doctrine is not actual notice, but the other principle element of the doctrine – the requirement that a legislature establish minimal standards to govern law enforcement. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors and juries to pursue their personal predilections." *Kolender v. Lawson*, 461 U.S. at 358 (citations omitted). Laws, like Scottsdale's, which make it a crime to disobey a police officer give police unlimited discretion to arrest people by deciding when disobedience to an order, however unreasonable, warrants arrest. In fact, police wanting to arrest a person, for whatever reason, can do so by giving an unreasonable order and then arresting the individual for failure to comply.

Likewise, this case raises an important issue in terms of the overbreadth doctrine. This Court, of course, has been clear that "substantial overbreadth" is required to invalidate a law under the First Amendment. *Virginia v. Hicks*, 123 S.Ct. 2191, 2196 (2003); *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). A law is unconstitutionally overbroad if it punishes a "substantial" amount of protected free speech "judged in relation to the statute's plainly legitimate sweep." *Virginia v. Hicks,* 123 S.Ct. at 2196. The Scottsdale ordinance is enormously overbroad. A police officer could tell any person engaged in constitutionally protected speech to be silent and the refusal to comply is illegal. Any person engaged in constitutionally protected assembly could be ordered to disperse and the

failure to comply is illegal. This Court should grant review to clarify this important issue of law that affects people on a daily basis throughout the country.

CONCLUSION

Gerald Kaiser respectfully requests that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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65 P.3d 463

Court of Appeals of Arizona,
Division 1, Department D

STATE of Arizona, Appellee,
v.
Gerald **KAISER**, Appellant

No. 1 CA-CR-02-0448.

April 1, 2003
Review Denied Sept. 9, 2003.

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OPINION

EHRLICH, Presiding Judge.

¶ 1 Gerald Kaiser appeals his conviction for refusing to obey a peace officer,[1] a class 1 misdemeanor violation of Scottsdale City Code section ("Code § ") 19-13. He contends that the regulation is unconstitutional because it is both vague and overbroad, thereby denying him due process in violation of the Fourteenth Amendment to the United

[1] A "peace officer" is "any person vested by law with a duty to maintain public order and make arrests." Ariz.Rev.Stat. § 13-105(25) (2001).

States Constitution.[2] For reasons that follow, we hold that the ordinance is constitutional.

FACTUAL AND PROCEDURAL BACKGROUND

¶ 2 Two Scottsdale peace officers stopped a car after an officer suspected that the driver, Kaiser's wife, was intoxicated. Kaiser was a passenger. When his wife got out of the car to talk with one officer, Kaiser yelled at his wife to not answer any questions or perform any field-sobriety tests. Then, despite being told by the other officer to remain in the car, Kaiser got out and attempted to approach his wife and the investigating officer. The officers repeatedly instructed Kaiser not to interfere with the investigation and to get back in the vehicle, and, when he failed to comply, they told him to return to the car or he would be arrested. Kaiser persisted, repeatedly defying their orders. Eventually, he was arrested for failing to return to and remain in the car when told to do so and for interfering with the investigation. Throughout the incident, Kaiser appeared to the officers to be angry, disruptive, aggressive and profane, making comments that the officers interpreted as threats.

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[2] The Due Process Clause of the Arizona Constitution is construed similarly to the same clause in the United States Constitution. *Simat Corp. v. Ariz. Health Care Cost Containment Sys.*, 203 Ariz. 454, 464 ¶ 47, 56 P.3d 28, 38 (2002) (Berch, J., dissenting); *State v. Bible*, 175 Ariz. 549, 594, 858 P.2d 1152, 1197 (1993), *cert. denied*, 511 U.S. 1046, 114 S.Ct. 1578, 128 L.Ed.2d 221 (1994). *See* S.G. Feldman & D.L. Abney, *The Double Security of Federalism: Protecting Individual Liberty Under the Arizona Constitution*, 20 ARIZ. ST. L.J. 115 (Spring 1988).

¶ 3 Charged with refusing to obey a peace officer, Kaiser was convicted in Scottsdale City Court for having violated Code § 19-13, which provides in pertinent part that "[n]o person shall refuse to obey a peace officer engaged in the discharge of his duty." He appealed his conviction to the Maricopa County Superior Court, ARIZ.REV.STAT. ("A.R.S.") § 22-371 (2002), insisting that the law is vague and overbroad. The court rejected his argument and affirmed his conviction, finding that the ordinance was not vague and that Kaiser had no standing to complain that the ordinance is overbroad. Kaiser brought the same challenge to this court. A.R.S. § 22-375(A) (2002).

DISCUSSION

¶ 4 Because this matter originated in municipal court, our jurisdiction is limited to a review of the facial validity of the ordinance. *State v. Alawy,* 198 Ariz. 363, 364 ¶ 3, 9 P.3d 1102, 1103 (App. 2000); *State v. Singer,* 190 Ariz. 48, 50, 945 P.2d 359, 361 (App. 1997). Accordingly, if the regulation is facially valid, we do not proceed to analyze how it was applied to the individual defendant. *Alawy,* 198 Ariz. at 364 ¶ 3, 9 P.3d at 1103.

¶ 5 Before we determine whether an ordinance is facially valid, however, we must first address whether a defendant has standing to challenge the constitutionality of the ordinance. *Id.* at 364 ¶ 6, 9 P.3d at 1103. "Even if an ordinance or statute is vague in some particulars, a person 'to whose conduct a statute clearly applies may not successfully challenge it for vagueness.' " *Id.* (quoting *State v. Trachtman,* 190 Ariz. 331, 334, 947 P.2d 905, 908 (App. 1997) (quoting *Parker v. Levy,* 417 U.S. 733, 756, 94 S.Ct. 2547, 41

L.Ed.2d 439 (1974))). *See State v. McLamb,* 188 Ariz. 1, 6, 932 P.2d 266, 271 (App. 1996), *cert. denied,* 522 U.S. 814, 118 S.Ct. 60, 139 L.Ed.2d 23 (1997). Even so, "[u]nder some circumstances, litigants whose own activities are constitutionally unprotected can nonetheless challenge a statute as overbroad if the law 'substantially abridges the First Amendment rights of other parties not before the court.'" *State v. Musser,* 194 Ariz. 31, 32 ¶ 5, 977 P.2d 131, 132 (1999) (quoting *Village of Schaumburg v. Citizens for a Better Env't,* 444 U.S. 620, 634, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980)).

¶ 6 Peace officers may "take such steps as [are] reasonably necessary to protect their personal safety and to maintain the status quo" during an investigatory stop. *United States v. Hensley,* 469 U.S. 221, 235, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985). Kaiser does not contest the validity of the traffic stop or that the officers could properly investigate whether his wife was driving under the influence of alcohol. He does not contest that the officers were engaged in the discharge of their duties. He does not deny that he got out of his car several times and attempted to approach his wife and the investigating officer despite being told repeatedly to return to and remain in his vehicle and not interfere with the investigation. He complains only that the ordinance he violated is itself a violation of his constitutional right to due process.

¶ 7 Kaiser's conduct falls within the activity regulated by Code § 19-13 such that it cannot be said that the ordinance is facially vague or overbroad regardless of any theoretical unconstitutional application of the ordinance to others not before the court. Nevertheless, we may consider Kaiser to have standing and so we address the constitutionality of the ordinance.

¶ 8 The constitutionality of a statute is reviewed *de novo. Ariz. Dep't of Pub. Safety v. Superior Court (Falcone),* 190 Ariz. 490, 494, 949 P.2d 983, 987 (App. 1997). When an ordinance is challenged as being vague or overbroad, there is a strong presumption that it is constitutional, *Singer,* 190 Ariz. at 50, 945 P.2d at 361, and we will, if possible, interpret the regulation in such a way as to render it constitutional. *Alawy,* 198 Ariz. at 364 ¶ 5, 9 P.3d at 1103; *McLamb,* 188 Ariz. at 5, 932 P.2d at 270. In this regard, we give the language its plain and ordinary meaning. *Alawy,* 198 Ariz. at 365 ¶ 8, 9 P.3d at 1104. *See* A.R.S. § 1-213 ("Words and phrases shall be construed according to the common and approved use of the language."). It is the person challenging the enactment who bears the burden of establishing the contrary proposition. *Id.* at 364 ¶ 5, 9 P.3d at 1103; *Singer,* 190 Ariz. at 50, 945 P.2d at 361; *McLamb,* 188 Ariz. at 5, 932 P.2d at 270.

¶ 9 "A legislative enactment is unconstitutionally vague if it does not give persons of ordinary intelligence a reasonable opportunity to learn what it prohibits and does not provide explicit standards for those who will apply it." *McLamb,* 188 Ariz. at 5, 932 P.2d at 270 (quoting *State v. Takacs,* 169 Ariz. 392, 394, 819 P.2d 978, 980 (App.1991)). *See Singer,* 190 Ariz. at 50, 945 P.2d at 361 (citing *Kolender v. Lawson,* 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)). However, the requirement of a "fair and definite warning" does not necessitate "perfect notice or absolute precision" of language. *Singer,* 190 Ariz. at 50, 945 P.2d at 361 (quoting *State v. Phillips,* 178 Ariz. 368, 370, 873 P.2d 706, 708 (App.1994)). *See Grayned v. City of Rockford,* 408 U.S. 104, 110, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

> The Constitution only requires that language convey a sufficiently definite warning as to proscribed

> conduct when measured by common understanding and practices. That there will be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense.

McLamb, 188 Ariz. at 5, 932 P.2d at 270 (quoting *State v. Cota,* 99 Ariz. 233, 236, 408 P.2d 23, 26 (1965)).

¶ 10 Kaiser argues that Code § 19-13 is vague because no *mens rea* is required. He adds that, under the ordinance, "every contact between the police and the public provides the potential of an arrest for declining to obey whatever a policeman may decide he wants" resulting in arrest and conviction at the "whim" of the officer whether the failure to comply is intentional or not.

¶ 11 First, the ordinance does contain a *mens rea* requirement: It requires that a person "refuse" to obey an order. To refuse an order is an affirmative act of rejection, not a bare failure to obey but a knowing and deliberate decision to not obey.[3] Absent a refusal to obey, as opposed to a mere failure to obey, there can be no violation of the ordinance.

¶ 12 Second, as Code § 19-13 provides, the order must be one of "a peace officer engaged in the discharge of his duty." While the Scottsdale City Code does not define

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[3] "Refuse" means "[t]o deny, decline, reject." BLACK'S LAW DICTIONARY 1282 (6th ed.1990). The act of refusal is one of will; in contrast, "fail" may be an act of inevitable necessity. *Maestas v. Am. Metal Co. of N.M.,* 37 N.M. 203, 20 P.2d 924, 925 (1933) (citing *Taylor v. Mason,* 22 U.S. (9 Wheat.) 325, 344, 6 L.Ed. 101 (1824)).

"peace officer" or "discharge of duty," the Arizona legislature has defined a "peace officer" to be "any person vested by law with a duty to maintain public order and make arrests," A.R.S. § 13-105(25), and this duty can only be accomplished through the lawful enforcement of state and local laws. In other words, there is no violation of Code § 19-13 if the order that is refused is not one made in connection with the discharge of the duties of the peace officer. A legislative enactment "is not void for vagueness 'simply because it may be difficult to determine how far one can go before the statute is violated.'" *McLamb,* 188 Ariz. at 5, 932 P.2d at 270 (quoting *Phillips,* 178 Ariz. at 370, 873 P.2d at 708) (quoting *Berenter v. Gallinger,* 173 Ariz. 75, 81, 839 P.2d 1120, 1126 (App. 1992)).

¶ 13 Kaiser relies heavily on *City of Chicago v. Morales,* 527 U.S. 41, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999), in which the Supreme Court found facially invalid an ordinance that provided that, if a police officer reasonably believed that at least one of two or more persons present in a public place was a member of a "criminal street gang" and that the persons were loitering by remaining in a place "with no apparent purpose," the officer must order all the persons to disperse "from the area." However, the analysis is fully distinguishable from that pertinent to this case.

¶ 14 In *Morales,* the Court first noted that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment," *id.* at 53, 119 S.Ct. 1849, and that "[i]t is difficult to imagine how any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an 'apparent purpose.'" *Id.* at 56-57, 119 S.Ct. 1849. Additionally, the ordinance provided no advance notice to any "putative loiterer" to protect him

from being ordered to disperse, and it provided no guidance as to how long a loiterer must remain away, how far away he must move or when he could regroup with the other loiterers before being asked to disperse once more without being subject to arrest. *Id.* at 59, 119 S.Ct. 1849. In other words, the ordinance failed to give adequate notice of what was forbidden and what was permitted. *Id.* at 60, 119 S.Ct. 1849.

¶ 15 Also, as found by the Court in *Morales,* there were no guidelines for enforcement. *Id.* The police were given "absolute discretion" to determine what constituted loitering in violation of the ordinance. *Id.* at 61, 119 S.Ct. 1849. "Presumably an officer would have discretion to treat some purposes – perhaps a purpose to engage in idle conversation or simply to enjoy a cool breeze on a warm evening – as too frivolous to be apparent if he suspected a different ulterior motive." *Id.* at 62, 119 S.Ct. 1849.

¶ 16 The ordinance in *Morales* is in no way comparable to the Scottsdale ordinance. A person of ordinary intelligence will understand what the Scottsdale ordinance prohibits and in what context that conduct may be prohibited. Further, Code § 19-13 provides sufficient objective standards for one charged with its enforcement to know what conduct is unlawful. Finally, the ordinance does not encourage arbitrary enforcement. It is not unconstitutionally vague.

¶ 17 Kaiser also complains that Code § 19-13 is void for overbreadth. "An overbroad statute is one designed to burden or punish activities which are not constitutionally protected, but . . . includes within its scope activities which are protected by the First Amendment." *McLamb,* 188 Ariz. at 9, 932 P.2d at 274 (quoting *State v. Baldwin,* 184

Ariz. 267, 269, 908 P.2d 483, 485 (1995)) (quoting *State v. Jones,* 177 Ariz. 94, 99, 865 P.2d 138, 143 (App.1993)) (internal quotations omitted) (alteration original). But, as noted by the Court in *Broadrick v. Oklahoma,* 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973), "where conduct and not merely speech is involved . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *See McLamb,* 188 Ariz. at 9, 932 P.2d at 274. "There must be a realistic danger that the statute will *significantly* jeopardize recognized first amendment protections of individuals not before the court." *McLamb,* 188 Ariz. at 10, 932 P.2d at 275 (quoting *State v. Steiger,* 162 Ariz. 138, 144, 781 P.2d 616, 622 (App.1989) (citation omitted) (emphasis original)).

¶ 18 We discern no realistic danger that Code § 19-13 will significantly put at risk the First Amendment rights of those persons not before the court. The refusal to obey a legitimate order of a sworn peace officer does not implicate the constitutional rights of a person. Certainly the mere possibility that some impermissible application can be conceived is not sufficient to render a statute overbroad. *Id.*

¶ 19 Kaiser also relies on *Shuttlesworth v. City of Birmingham,* 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965), in which the Court needed to address the issue of the overbreadth of a city regulation in only a passing manner. The ordinance provided that "[i]t shall be unlawful for any person to refuse or fail to comply with any lawful order, signal or direction of a police officer." The Court found that "the literal terms of this ordinance are so broad as to evoke constitutional doubts of the utmost gravity" but noted that the lower court had confined the ordinance to a relatively narrow scope. *Id.* at 93, 86 S.Ct.

211. This was the extent of the court's discussion of overbreadth with regard to this ordinance, and, significantly, the Court did not determine that the ordinance was unconstitutional. Rather, it disposed of the matter on the basis that there was no evidence to support the conviction because the officer was not engaged in the direction of vehicular traffic, a prerequisite for the enforcement of that ordinance. *Id.* at 95, 86 S.Ct. 211. Unlike the present case, there was no evidence that the defendant had refused or failed to comply with a lawful order.

CONCLUSION

¶ 20 "There are areas of human conduct where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision." *Smith v. Goguen,* 415 U.S. 566, 581, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974). As was true in many of the cases discussed and cited above, this is such a case. The Scottsdale City Code Section 19-13 is constitutional as it is neither vague nor overbroad.

CONCURRING: SHELDON H. WEISBERG, Judge, and EILEEN S. WILLETT, Judge Pro Tempore.*

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* The Honorable Eileen Willett, a judge of the Maricopa County Superior Court, was authorized to participate as a Judge *Pro Tempore* of the Court of Appeals by order of the Chief Justice of the Arizona Supreme Court pursuant to article 6, section 31 of the Arizona Constitution and Arizona Revised Statutes section 12-145 *et seq.* (1992 & Supp.2002).

MINUTES

Arizona Supreme Court

Tuesday September 09, 2003

CR-03-0144-PR ***STATE OF ARIZONA*** 1 CA-CR 02-0448
(17) ***v GERALD KAISER***

Court of Appeals Division One

ORDERED: Petition for Review = DENIED